

NTSB Order No. EA-3647

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

Respondent .

Docket SE-10617

Respondent has appealed from the initial decision Administrative Law Judge William R. Mullins issued in this proceeding on May 4, 1990, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot (ATP) certificate for 30 days on allegations that he had violated

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sections 91.75(b) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91,² by deviating from an air traffic control (ATC) instruction.

The Administrator's order, which was filed as the complaint in this matter, alleges that on November 25, 1988, respondent was the pilot-in-command (PIC) of a United Parcel Service flight departing Boeing Field. The order³ further alleges that prior to the flight, respondent received an instruction to hold short of Runway 13 Left at Taxiway Alpha 4; that respondent acknowledged the instruction; and that respondent then deviated from it by going across the runway. Respondent admitted in his amended answer to the complaint that his First Officer had received and acknowledged the instruction. However, he claimed that he asked his crew if he was cleared to cross the runway as he taxied the aircraft, and that both his First Officer and Flight Engineer answered in the affirmative.

With the case in this posture, the hearing commenced before the Administrative Law Judge. Because the Flight Engineer was in

²FAR sections 91.75(b) and 91.9 provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.75 Compliance with ATC clearances and instructions....

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

³As amended prior to the hearing.

an advanced state of pregnancy at the time of the hearing, the Administrator presented her sworn⁴ testimony by telephone, over respondent's objection.⁵ The law judge ruled that the nature of the presentation of the testimony would go to the weight he accorded it and not to its admissibility, noting that even hearsay is admissible in administrative hearings. The Flight Engineer denied that she had told respondent that the aircraft was cleared to cross the runway. Moreover, she testified, she never heard respondent ask the First Officer whether they were cleared to cross the runway, nor did she hear the First Officer tell respondent he was cleared.

Respondent admits that he was wearing his headset, and that it was tuned to the ATC frequency. He does not claim that he did not hear the instruction given by ATC, only that he did not hear it as it was given, because he interpreted the instruction to be that they were cleared to cross 13 left and hold short of 13 right. Nor does respondent remember hearing the read back, claiming that he was busy monitoring the Flight Engineer's completion of pre-taxi items and assisting her in troubleshooting a mechanical problem at the time the First Officer called for the instruction.⁶ In any event, respondent claims

⁴The Flight Engineer was sworn by a court reporter who was present with and identified the witness.

⁵Respondent's counsel cross-examined the witness notwithstanding his objection to her testimony.

⁶Respondent claims that he had to closely monitor the Flight Engineer's performance because she had limited experience on this type of aircraft.

that he asked his crew if they were cleared to cross the runway, and he claims that they both answered affirmatively.

The Administrator presented the testimony of the First Officer in rebuttal. According to the First Officer, after he read back the instruction to ATC, the aircraft immediately began its taxi. He started to perform his pre-flight duties and was looking down at his maps⁷ when he heard the controller tell them they were not cleared to cross the runway. The First Officer denies telling respondent that the aircraft was cleared to cross the runway, and he does not recall respondent posing this question to the Flight Engineer. The First Officer assumed respondent heard the instruction.⁸ According to the testimony of an FAA Inspector, if the PIC has a headset on, it is reasonable for the First Officer to assume that the PIC has heard the instruction and the read back.

The law judge found that because respondent had his headset on, the First Officer could reasonably believe that respondent heard the instruction and the acknowledgment of that instruction.

He also found that the First Officer's testimony was corroborated by the Flight Engineer's testimony that respondent

⁷The deviation took only a matter of moments, as it apparently takes less than 30 seconds to taxi from the terminal to 13 Left, which is less than 100 yards north of the terminal.

⁸When the controller questioned them over the radio, the First Officer claimed that they were cleared, but he explained in his testimony that he only said this because "the best defense is a good offense." (TR-63). The First Officer's airman certificate was suspended by the Administrator for 10 days as a result of this incident.

asked neither of them if the aircraft had been cleared to cross the runway. The law judge placed even greater significance in his initial decision on the fact that the aircraft began to move immediately after the instruction had been received. The law judge concluded that there was evidence sufficient to sustain the Administrator's order.

The sole issue before the Board in this appeal is whether respondent was prejudiced by the admission of the Flight Engineer's testimony by telephone so as to require dismissal of the Administrator's order. We think respondent's appeal is meritless.

Respondent's claim that he was denied the right to confront the "sole eyewitness" presented in the Administrator's case-in-chief is based on legal principles inapplicable here. He relies on cases citing the Confrontation Clause of the U.S. Constitution (Amend. VI) and which, as the Administrator points out in his reply brief, involve criminal prosecutions, not civil or administrative hearings.⁹ The only non-criminal case cited by respondent in support of his assertions, Greene v. McElroy, 360 U.S. 474 (1959), is also inapposite. In that case, an individual's loss of his security clearance and job was based on anonymous allegations against which he was unable to defend effectively. Here, notwithstanding respondent's exaggerated

⁹It has long been held that safety enforcement proceedings under section 609 of the Federal Aviation Act of 1958 are civil, not criminal, in nature. See, e.g., Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986).

characterization of the Flight Engineer as the "sole eyewitness" presented by the Administrator in his case-in-chief, he knew the identity of the Flight Engineer and the First Officer, who testified in rebuttal, and he had the opportunity to cross-examine both of them, albeit by telephone in one instance. Respondent fails to articulate any actual prejudice which was caused to him by the use of telephonic testimony in these proceedings. Since the witness was sworn and subject to cross-examination, there is no basis to find that respondent was denied a fair hearing.¹⁰

In any event, the law judge made it clear in his decision that in addition to his implicit determination in favor of the First Officer's testimony, which was corroborated by the telephonic testimony of the Flight Engineer, the scenario they described was supported by other evidence - i.e., that respondent had on his headset and must have been listening to and heard the instruction and presumably the read back, because he then immediately moved the aircraft away from the terminal area. Finally, we do not find that respondent's preoccupation with other duties serves as an excuse for his carelessness in misunderstanding the instruction he heard. A reasonable and prudent pilot would have carefully monitored ATC communications.

¹⁰ Even if the admission of this testimony was prejudicial to respondent, which we do not find, the appropriate remedy would be a remand to the law judge so that the witness could appear before him to testify, not dismissal of the order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision and order are affirmed; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days after service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹¹For the purposes of this order, respondent must physically surrender his airline transport pilot certificate to an appropriate representative of the FAA pursuant to FAR section 61.19(f).